

The record consists of the transcript of the Regular Hearing, dated January 2, 1992; the deposition of Ernest Schlachter, M.D., dated September 10, 1992; the deposition of Jerry Hardin, dated October 30, 1992; the deposition of Michael Dreiling, dated November 20, 1992; the exhibits offered into evidence by the parties; and, the pleadings filed of record in the administrative file.

STIPULATIONS

The Appeals Board hereby adopts the stipulations listed in the Award of January 10, 1994.

ISSUES

The Special Administrative Law Judge was, after stipulations, required to make a decision regarding nature and extent of claimant's disability; whether claimant was entitled to unauthorized medical expense; and whether claimant was entitled to future medical treatment. For purposes of this appeal, however, the only issues argued relate to nature and extent of claimant's disability and future medical. The Appeals Board adopts the findings made by the Special Administrative Law Judge relating to unauthorized medical expense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board finds that claimant has a fifty-seven percent (57%) permanent partial general disability as a result of injuries arising out of and in the course of his employment on September 20, 1990.

Claimant was injured on September 20, 1990, when his truck came into contact with a power line as he backed it up to a water faucet. Claimant received an electrical shock and resulting injuries which included amputation above the proximal interphalangeal joint of the index finger and all of the little finger of the left hand. All ten toes were amputated and multiple skin grafts taken from both thighs to repair wounds. He does not now have good balance. He can only be on his feet for about two hours at a time and after being on his feet has difficulty with his knees and back as well.

The only medical expert to testify in this case was Dr. Ernest Schlachter. Dr. Schlachter testified claimant sustained a forty percent (40%) permanent partial impairment of function to the body as a whole. He recommended permanent restrictions of limited walking, no running, no stair climbing, and no carrying weights greater than thirty pounds for any length of time or fifty pounds on a single basis. He also indicated claimant will need a job which does not require a well-functioning left hand. Based on Dr. Schlachter's testimony, the only testimony on this issue, the Appeals Board finds that the claimant did suffer a forty percent (40%) permanent partial general body functional disability.

To determine whether claimant's work disability was greater than the functional disability, the Appeals Board must examine both: a) the nature and extent to which his ability to perform work in the open labor market has been reduced; and, b) the extent to which his ability to earn comparable wage has been reduced. These factors are to be considered in light of the claimant's education, training, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990).

Each party presented expert testimony relating to factors used to determine work disability. Michael Dreiling testified on behalf of the respondent and gave an opinion that claimant has lost fifty percent (50%) of his access to the open labor market. From claimant's history he concluded that prior to the injury claimant was doing anywhere from light to very heavy work. From the restrictions recommended by Dr. Schlachter, Michael

Dreiling concluded claimant can no longer work in the heavy or medium categories and is restricted from working in part of the light category. He testified that claimant has a twenty percent (20%) loss of ability to earn comparable wage based upon his opinion that after the injury claimant would be expected to earn approximately \$6.00 per hour.

Claimant presented testimony of Mr. Jerry Hardin. Mr. Hardin testified that claimant has sustained a ninety to ninety-nine percent (90%-99%) reduction in ability to perform work in the open labor market. This in part reflected his conclusion that a number of the jobs in the sedentary category would be eliminated because claimant could not effectively use his left hand. Mr. Hardin opined that claimant will be able to earn approximately \$5.00 an hour or \$200.00 per week after the injury. He compared this to what he understood to be a \$300.00 per week pre-injury wage, to arrive at a thirty-three percent (33%) loss of ability to earn comparable wage.

The Special Administrative Law Judge found from this evidence that claimant suffered a fifty-nine and one-half percent (59.5%) disability on the basis of an analysis which relies primarily upon the testimony of Mr. Hardin. The Special Administrative Law Judge has indicated, from his review of the facts, he believes the evidence supports Mr. Hardin's conclusion that claimant's work would be limited to sedentary type of employment and, therefore, that the claimant has suffered a ninety percent (90%) permanent reduction in his ability to perform work in the open labor market. The Special Administrative Law Judge then uses a twenty-nine percent (29%) wage loss based upon a comparison of \$7.00 per hour, which he understood to be the pre-injury wage without overtime, to \$5.00 which Mr. Hardin has testified is the probable post-injury wage. Averaging the twenty-nine percent (29%) and ninety percent (90%) as authorized by the Hughes decision results in the fifty-nine and one-half percent (59.5%) awarded by the Special Administrative Law Judge.

While the Appeals Board finds fifty-nine and one-half percent (59.5%) to be a reasonable assessment of the disability claimant suffered, the Appeals Board would apply a different analysis. As in prior cases, where there has been no evidence relating to what overtime or fringe benefits claimant might receive after the injury, the Appeals Board used the hourly rate post-injury and compared it to the pre-injury average weekly wage. The latter includes overtime and fringe benefits where appropriate to calculate an average weekly wage under K.S.A. 44-511. As the Appeals Board has previously indicated, it is the respondent's burden to come forward with evidence relating to post-injury fringe benefits or overtime. Fulton v. Cherry Village, Inc., Docket No. 166,252 (Mar. 1994). In this case the resulting calculation compares \$240.00 per week wage under Mr. Dreiling's testimony with a \$374.98 stipulated average weekly wage, for a thirty-six percent (36%) loss of ability to earn a comparable wage. Using Mr. Hardin's figures of \$200.00 per week post-injury, the result is a forty-seven percent (47%) loss of ability to earn a comparable wage as he has testified in his deposition. By averaging these two figures the Appeals Board finds claimant's wage earning ability has been reduced by forty-one and one-half percent (41.5%).

The Appeals Board also finds it reasonable in this case to average the two opinions relating to the loss of access to the open labor market. The Appeals Board agrees with the conclusion of the Special Administrative Law Judge that Mr. Dreiling's opinion is somewhat understated. However, the Appeals Board does not from that, feel that it is appropriate to therefore adopt ninety percent (90%) indicated by Mr. Hardin's testimony. The Appeals Board believes, based upon the record as a whole, the opinion of Mr. Dreiling understates,

but the opinion of Mr. Hardin overstates, the loss. The Appeals Board therefore considers it appropriate to average those two for a resulting seventy-two and one-quarter percent (72.25%) loss of access to the open labor market. Because there appears to be no reason why either of these two prongs of the calculation should be entitled to greater weight in this case, those two are averaged to result in a fifty-seven percent (57%) work disability.

The Appeals Board has set forth the above method of arriving at its conclusion in order to be consistent with previous decisions. The Appeals Board recognizes that its findings modify the decision of the Special Administrative Law Judge by two and one-half percent (2.5%). We do not by this intend to suggest the process is so precise as to permit such fine distinctions. The change is made here, however, to be consistent in method with prior decisions.

(2) The Appeals Board agrees with the decision of the Special Administrative Law Judge allowing certain future medical expenses. The Special Administrative Law Judge has awarded future medical in the form of orthotic shoes required by the loss of claimant's toes which resulted from his injury. Respondent argues that this should have some specific limits rather than an open-ended award for those shoes to be provided. Both claimant and Dr. Schlachter testified that the shoes would have to be replaced approximately every six months. The Appeals Board concludes the finding by the Special Administrative Law Judge that the claimant is entitled to a replacement of orthoses in his shoes at regular intervals without the necessity for further application to the Director is appropriate and is hereby approved.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director David A. Shufelt dated January 10, 1994, should be modified as reflected below.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dale D. Deets, and against the respondent, Oxford Sand & Gravel Company, and the insurance carrier, CIGNA, for an accidental injury sustained on September 20, 1990.

The claimant is entitled to 91.29 weeks temporary total disability at the rate of \$250.00 per week or \$22,822.50 followed by 323.71 weeks at \$142.50 per week or \$46,128.68 for a 57% permanent partial general bodily disability making a total award of \$68,951.18.

As of April 29, 1994, there would be due and owing to the claimant 91.29 weeks temporary total compensation at \$250.00 per week in the sum of \$22,822.50 plus 97 weeks permanent partial compensation at \$142.50 per week in the sum of \$13,822.50 for a total due and owing of \$36,645.00 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$32,306.18 shall be paid at \$142.50 per week for 226.71 weeks or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Deposition Services	
Transcript of Regular Hearing	\$219.60
Barber & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$135.20
Deposition of Jerry D. Hardin	289.60
	\$424.80
Don K. Smith & Associates	
Deposition of Michael Dreiling	\$322.00

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Stephen J. Jones, 1999 N. Amidon, Suite 340, Wichita, KS 67203
Kirby A. Vernon, 600 Epic Center, 301 N. Main, Wichita, KS 67202
David A. Shufelt, Assistant Director
George Gomez, Director